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9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

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12 ANZA TECHNOLOGY, INC.,  
13 Plaintiff,

14 v.

15 MUSHKIN, INC., a Colorado  
16 Corporation, d/b/a ENHANCED  
17 NETWORK SYSTEMS, INC.; and  
18 AVANT TECHNOLOGY, INC., a  
Nevada corporation, d/b/a  
MUSHKIN ENHANCED MFG,  
19 Defendants.

CIV. NO. 2:17-00656 WBS EFB

ORDER RE: MOTIONS TO DISMISS OR  
TRANSFER

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22 Plaintiff Anza Technology, Inc. ("Anza") brought this  
23 patent infringement action against Mushkin, Inc. ("Mushkin") and  
24 Avant Technology, Inc. ("Avant") based on defendants' alleged use  
25 of certain tools and techniques in the manufacture of integrated  
26 circuit chips. Mushkin moves for dismissal for improper venue  
27 under Federal Rule of Civil Procedure 12(b)(3) ("Rule 12(b)(3)");  
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1 dismissal for improper joinder under Federal Rule of Civil  
2 Procedure 21 ("Rule 21"); or severance and transfer under Rule  
3 21, 28 U.S.C. § 1404(a), or 28 U.S.C. § 1406(a). (Docket No.  
4 29.) Avant moves for dismissal under Federal Rule of Civil  
5 Procedure 12(b)(6) ("Rule 12(b)(6)"); dismissal for improper  
6 venue under Rule 12(b)(3); or transfer under 28 U.S.C. § 1404(a)  
7 or 28 U.S.C. § 1406(a). The court held oral argument on the  
8 motions on December 18, 2018.

9 I. Legal Standard

10 Under 28 U.S.C. § 1406(a), if a case is filed in an  
11 improper venue, the district court "shall dismiss, or if it be in  
12 the interest of justice, transfer such case to any district or  
13 division in which it could have been brought." On a motion for  
14 improper venue under Rule 12(b)(3), the court need not accept the  
15 pleadings as true and may consider supplemental written materials  
16 and facts outside the pleadings in deciding the motion. Munns v.  
17 Clinton, 822 F. Supp. 2d 1048, 1079 (E.D. Cal. 2011) (England,  
18 J.) (citing, inter alia, Murphy v. Schneider Nat'l, Inc., 362  
19 F.3d 1133, 1137 (9th Cir. 2004)). The decision to dismiss for  
20 improper venue or to transfer venue to a proper court is a matter  
21 within the sound discretion of the district court. Munns, 822 F.  
22 Supp. 2d at 1079 (citing Cook v. Fox, 537 F.2d 370, 371 (9th Cir.  
23 1976)).

24 Venue in patent cases is governed by 28 U.S.C. §  
25 1400(b), rather than the more permissive general venue statute,  
26 28 U.S.C. § 1391. TC Heartland LLC v. Kraft Foods Grp. Brands  
27 LLC, 137 S. Ct. 1514, 1518-19 (2017). Under § 1400(b), patent  
28 infringement actions may only be brought in (1) "the judicial

1 district where the defendant resides” or (2) “where the defendant  
2 has committed acts of infringement and has a regular and  
3 established place of business.” 28 U.S.C. § 1400(b).

4 For purposes of § 1400(b), “a domestic corporation  
5 ‘resides’ only in its State of incorporation.” TC Heartland, 137  
6 S. Ct. at 1517. “[T]he regular and established place of business  
7 standard requires more than the minimum contacts necessary for  
8 establishing personal jurisdiction or for satisfying the doing  
9 business standard of the general venue provision.” In re Cray  
10 Inc., 871 F.3d 1355, 1361 (Fed. Cir. 2017). This standard  
11 requires that “(1) there must be a physical place in the  
12 district; (2) it must be a regular and established place of  
13 business; and (3) it must be the place of the defendant.” Id. at  
14 1361.

## 15 II. Analysis

16 Here, there is no dispute that both Mushkin, a Colorado  
17 corporation, and Avant, a Nevada corporation with its principal  
18 place of business in Texas, reside outside the Eastern District  
19 of California, and therefore venue does not lie under the first  
20 prong of § 1400(b). (See 1st Am. Compl. ¶¶ 7, 9.) Nor is there  
21 any claim by plaintiff that either Mushkin and Avant have a  
22 regular and established place of business in the Eastern District  
23 of California, and defendants’ evidence shows that they do not.  
24 (See Mushkin Mot. Dismiss Stathakis Decl. ¶ 11 (Docket No. 29-2)  
25 (stating that Mushkin has no physical place of business,  
26 warehouse, inventory, employees or sales representatives, or  
27 continual presence in the Eastern District of California);  
28 Mushkin Peddecord Decl. ¶ 9 (Docket No. 29-3) (stating that Avant

1 has no physical place of business, warehouse, inventory,  
2 employees or sales representatives, or continual presence in  
3 California or Colorado).) Most importantly, plaintiff conceded  
4 at oral argument that venue was not proper in the Eastern  
5 District of California, and the court agrees.<sup>1</sup>

### 6 III. Remedy

7 Having determined that venue does not lie in the  
8 Eastern District of California, the court must determine whether  
9 the appropriate remedy is dismissal or transfer. The parties  
10 agree that the court may sever the case and transfer plaintiff's  
11 claims against Mushkin to the District of Colorado, where Mushkin  
12 resides and has a regular and established place of business, and  
13 transfer the claims against Avant to the Western District of  
14 Texas, where Avant is headquartered. However, defendants prefer  
15 that the case be dismissed, while plaintiff prefers that the  
16 entire case should be transferred to the Western District of  
17 Texas.

18 It was not apparent that venue was improper in the  
19 Eastern District of California at the time this action was filed,  
20 before the Supreme Court's decision in TC Heartland.  
21 Accordingly, because all parties agree that plaintiff's claims  
22 may be brought separately in the District of Colorado and the

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23 <sup>1</sup> Because the Eastern District of California is not a  
24 proper venue for either defendant, the court will deny  
25 defendants' motions and plaintiff's request to transfer to the  
26 extent they rely on 28 U.S.C. § 1404(a). See, e.g., Action  
27 Embroidery Corp. v. Atl. Embroidery, Inc., 368 F.3d 1174, 1181  
28 (9th Cir. 2004) (where venue is improper, defendant may move for  
dismissal or transfer under § 1406(a), and where venue is proper  
but inconvenient, defendant may move for change of venue under §  
1404(a)).

1 Western District of Texas, and dismissal may reduce any potential  
2 recovery by plaintiff due to statute of limitations issues, the  
3 court does not find that maintaining this suit after TC Heartland  
4 warrants dismissal under Rule 1406(a).

5           Instead, the court will sever and transfer plaintiff's  
6 claims against Mushkin to the District of Colorado, and the  
7 claims against Avant to the Western District of Texas. Transfer  
8 under § 1406(a) is only permitted "to any district or division in  
9 which it could have been brought" and plaintiff has not shown  
10 that the case could have been brought against both defendants in  
11 the Western District of Texas. See, e.g., Wordtech Sys. Inc. v.  
12 Integrated Network Sols., Corp., No. 2:04-cv-01971-TLN, 2014 WL  
13 2987662, at \*4 (E.D. Cal. July 1, 2014) (citation omitted) ("When  
14 there are multiple parties and/or multiple claims in an action,  
15 the plaintiff must establish that venue is proper as to each  
16 defendant and as to each claim.").

17           Mushkin has provided evidence establishing (1) it is  
18 incorporated in and its headquarters and principal place of  
19 business are in Colorado; (2) it sold its entire memory  
20 components business to Avant in 2012 and is no longer involved in  
21 the design, manufacture, assembly, or importation of integrated  
22 circuit memory products, including any such products under the  
23 Mushkin name, which it no longer uses; (3) it has no co-branding  
24 relationship with Avant with respect to Mushkin-branded memory  
25 products; and (4) it has never owned or occupied any facility in  
26 Texas, including Avant's facility in Pflugerville, and has no  
27 regular or continual business presence in Texas. (Stathakis  
28 Decl.) Defendants have also provided evidence that Avant

1 operates under its trade name as Mushkin Enhanced MFG and that  
2 since the 2012 asset sale, Avant has been the sole assembler and  
3 seller of Mushkin brand memory products under the Mushkin  
4 Enhanced MFG name. (Peddecord Decl. ¶¶ 5-8.)

5 In the face of this evidence, any ambiguity on the  
6 mushkin.com website and any ambiguity regarding the asset sale  
7 from Mushkin to Avant are insufficient to show that Mushkin has a  
8 regular and established place of business in the Western District  
9 of Texas. Similarly, the fact that Mushkin has a registered  
10 agent with the Texas comptroller does not show that the  
11 corporation has a regular and established place of business  
12 within Texas. Thus, venue in the Western District of Texas is  
13 not proper as to Mushkin, and the court may not transfer the  
14 claims against Mushkin to that district. However, because the  
15 parties agree that venue is proper as to plaintiff's claims  
16 against Mushkin in the District of Colorado and as to plaintiff's  
17 claims against Avant in the Western District of Texas, the court  
18 will sever and transfer plaintiff's claims to those districts.

19 IT IS THEREFORE ORDERED that defendants' Motions to  
20 dismiss or transfer for improper venue (Docket Nos. 29, 30) be,  
21 and the same hereby are, GRANTED. Plaintiff's claims against  
22 Mushkin are hereby SEVERED AND TRANSFERRED to the District of  
23 Colorado for all further proceedings. Plaintiff's claims against  
24 Avant are hereby SEVERED AND TRANSFERRED to the Western District  
25 of Texas for all further proceedings.<sup>2</sup> As all claims will be

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26 <sup>2</sup> The court expresses no opinion as to whether defendants  
27 were properly joined in this suit and whether plaintiff  
28 sufficiently alleged its claims for patent infringement against  
either defendant.

1 transferred out of the Eastern District of California, the Clerk  
2 of Court is instructed to close this case after transfer is  
3 complete.

4 Dated: December 20, 2017



5 WILLIAM B. SHUBB

6 UNITED STATES DISTRICT JUDGE  
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